No. 49654-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DEMETRIUS D. WARLICK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR PIERCE COUNTY

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. Imposition of convictions for stalking and violation of a no contact order violated double jeopardy.

2. The sentences of 60 months confinement plus 12 months community custody sentence imposed for the violation of court order convictions exceeded the statutory maximum and must be remanded for resentencing.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The merger doctrine is derives from double jeopardy and provides that where one offense elevates the degree of another offense, imposing convictions for both violates double jeopardy. Here, to elevate stalking to a felony, the State was required to prove the stalking violated a protective order protecting Ms. Rilea. Did the court violate double jeopardy when it imposed convictions for violations of no contact orders that were used to elevate the stalking conviction to a felony?

2. A trial court's authority to impose sentences is statutory. The maximum sentence for a class felony is 60 months. A sentence for felony violation of a no contact order, a class C felony, cannot exceed 60 months, including any enhancements and terms of community

custody. Here, Mr. Warlick's sentence for felony violation of no contact order plus the 12 month term of community custody exceeded 60 months. Is Mr. Warlick entitled to remand for resentencing to a correct sentence?

C. STATEMENT OF THE CASE

Demetrius Warlick and Sherry Rilea Warlick were married in 2010, and in 2016 were in the middle of a contentious divorce. RP 310-13. In 2016, a no contact order was in place prohibiting contact between the two. CP 44; RP 314.

Mr. Warlick was observed on three occasions attempting to contact Ms. Rilea, and on two occasions, Ms. Rilea alleged Mr. Warlick damaged her car. RP 316-17, 322-27, 338-41. In addition, Ms. Rilea claimed Mr. Warlick attempted to contact her by phone from jail after he was arrested. RP 362. As a result, Mr. Warlick was charged with three counts of felony violation of a no contact order, one count of stalking, and two counts of third degree malicious mischief. CP 7-10. Following a jury trial, Mr. Warlick was convicted of the violations of a no contact order counts, the stalking count, and one malicious mischief count. CP 53-64; RP 718-19.

At sentencing, the court imposed separate sentences for the violations of a no contact order and for stalking. CP 108. In addition, the court imposed the statutory maximum sentence for the violation of a no contact order counts and imposed 12 months of community custody. CP 108-09.

D. ARGUMENT

1. **Imposition of convictions for stalking and violations of a no contact order violated double jeopardy.**

a. *Multiple convictions for the same act violate double jeopardy.*

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." Article I, section 9 of the Washington State Constitution provides that "[n]o person shall ... be twice put in jeopardy for the same offense." The two clauses provide the same protection. *In re Personal Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007); *State v. Weber*, 159 Wn.2d 252, 265, 149 P.3d 646 (2006). Among other things, the double jeopardy provisions bar multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

The Legislature can enact statutes imposing, in a single proceeding, cumulative punishments for the same conduct. "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter,* 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). If the Legislature intended to impose multiple punishments, their imposition does not violate the double jeopardy clause. *Id.* at 368.

If, however, such clear legislative intent is absent, then the *Blockburger* test applies. *Id.; see Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Under this test, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* If application of the *Blockburger* test results in a determination that there is only one offense, then imposing two punishments is a double jeopardy violation. The assumption underlying the *Blockburger* test is that the Legislature ordinarily does not intend to punish the same conduct under two different statutes; the *Blockburger* test is a rule of statutory construction

applied to discern legislative purpose *in the absence of clear indications of contrary legislative intent. Hunter,* 459 U.S. at 368.

In short, when a single trial and multiple punishments for the same act or conduct are at issue, the initial and often dispositive question is whether the legislature intended that multiple punishments be imposed. *Id.; State v. Kier,* 164 Wn.2d 798, 804, 194 P.3d 212 (2008). If there is clear legislative intent to impose multiple punishments for the same act or conduct, this ends the inquiry and there is no double jeopardy violation. If such clear intent is absent, then the court applies the *Blockburger* "same evidence" test to determine whether the crimes are the same in fact and law. *State v. Calle,* 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995).

Double jeopardy challenges are reviewed *de novo. State v. Freeman,* 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

b. *The convictions for violations of the no contact order merged with the stalking conviction.*[1]

The merger doctrine is another aid in determining legislative intent, even when two crimes have formally different elements. Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, it must be presumed the Legislature intended to punish both offenses through a greater sentence for the greater crime. *State v. Vladovic*, 99 Wn.2d 413, 419, 662 P.2d 853 (1983).

> The merger doctrine is simply another means, in addition to the *Blockburger* and "same evidence" tests, by which a court may determine whether the legislative branch has authorized multiple punishments. Thus, the merger doctrine is simply another means by which a court may determine whether the imposition of multiple punishments violates the Fifth Amendment guarantee against double jeopardy, *i.e.*, whether the legislative branch, acting within its own constitutional limitations, has authorized cumulative punishments.

State v. Frohs, 83 Wn.App. 803, 811, 924 P.2d 384 (1996).

The merger doctrine applies when an offense is elevated to a higher degree by proof of another offense proscribed elsewhere in the

[1] Because the merger doctrine raises constitutional double jeopardy concerns, Mr. Warlick's failure to raise the merger doctrine at sentencing does not bar this Court's review under RAP 2.5(a). *See State v. Ralph*, 175 Wn.App. 814, 822-23, 308 P.3d 729 (2013) ("this (merger) issue constitutes a manifest constitutional error for purposes of RAP 2.5(a)(3)'s preservation exception. . .").

criminal code. *State v. Parmelee*, 108 Wn.App. 702, 711, 32 P.3d 1029 (2001); *State v. Eaton*, 82 Wn.App. 723, 730, 919 P.2d 116 (1996). The merger doctrine applies at sentencing and its purpose is to correct violations of the prohibition against double jeopardy. *State v. Chesnokov*, 175 Wn.App. 345, 355, 305 P.3d 1103 (2013). The merger doctrine avoids double punishment by merging a lesser offense "into the greater offense when one offense raises the degree of another offense." *State v. Collicott*, 118 Wn.2d 649, 668, 827 P.2d 263 (1992).

Stalking requires a finding of repeated harassment or repeated following. RCW 9A.46.110. Stalking is elevated to a felony if "the stalking violates any protective order protecting the person being stalked." RCW 9A.46.110(5)(b).

In *Parmelee*, the defendant was convicted on three counts of violating a protection order and on one count of felony stalking. At trial, the State used the same evidence to convict Parmelee of violating the protection orders and of felony stalking. On appeal, this Court held that two of the defendant's convictions for violating a protection order were essential to the elements of the crime of felony stalking, and because the acts were defined as criminal elsewhere in the criminal statutes, they merged into the stalking conviction. *Parmelee*, 180

Wn.App. at 711. But, because the State needed only to provide evidence of two harassing events to constitute stalking, the Court held that the third protection order violation conviction was not essential to an element of the felony stalking charge and, thus, stood as an independent conviction. *Parmelee*, 108 Wn.App. at 711.

The decision in *Parmelee* controls here. Here, as in *Parmelee*, the State used the same evidence to convict Mr. Warlick of violating the protection orders and of felony stalking. *Id.* Under *Parmelee*, the no contact order convictions merge with the stalking conviction. As a result, the no contact convictions must be dismissed as violative of double jeopardy.

2. The combined sentences imposed by the trial court for the felony violations of a court order convictions exceeded the statutory maximum for those offenses.

The Sentencing Reform Act (SRA) prescribes the trial court's authority to sentence in felony cases. *State v. Furman*, 122 Wn.2d 440, 456, 858 P.2d 1092 (1993); *State v. Skillman*, 60 Wn.App. 837, 839, 809 P.2d 756 (1991). Whenever a sentencing court exceeds its statutory authority, its action is void. *State v. Theroff*, 33 Wn.App. 741, 744, 657 P.2d 800 (1983). Whether a court has exceeded its sentencing authority

is a question of law reviewed *de novo*. *State v. Murray*, 118 Wn.App. 518, 521, 77 P.3d 1188 (2003).

A sentence imposed contrary to the law may be reviewed for the first time on appeal. *State v. Anderson*, 58 Wn.App. 107, 110, 791 P.2d 547 (1990). On appeal, a defendant may challenge a sentence imposed in excess of statutory authority because "a defendant cannot agree to punishment in excess of that which the Legislature has established." *In re Personal Restraint of Goodwin,* 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

Here, the offenses of felony violations of a court order were class C felonies with a maximum penalty of five years confinement. RCW 26.50.110(5). A court may not impose a term of community custody that, combined with the term of confinement, exceeds the maximum term of confinement allowed by RCW 9A.20.021. RCW 9.94A.505(5), RCW 9.94A.701(9).

RCW 9.94A.701 (9) provides that "[t]he term of community custody . . . shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021. Here, the trial court imposed the statutory

maximum sentence of 60 months of confinement and imposed a community custody term of 12 months. CP 108-09. This combined sentence exceeded the statutory maximum for the offense.

Where the sentence imposed exceeds the statutory maximum, the trial court must reduce the term of community custody. RCW 9.94A.701(9); *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012). The proper remedy is to "remand to the trial court to either amend the community custody term or resentence." *Boyd*, 174 Wn.2d at 473.

The trial court's imposition of the 60 month sentence and 12 months of community custody exceeded the statutory maximum of 60 months. The remedy is for this Court to remand to the trial court for resentencing.

E. CONCLUSION

For the reasons stated, Mr. Warlick asks this Court to reverse his sentence and remand for resentencing.

DATED this 28th day of July 2017.

Respectfully submitted,

s/Thomas M. Kummerow

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